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IN THE

Supreme Court of the United States

OCTOBER TERM, 1922

OMNIA COMMERCIAL COMPANY, INC., *Appellant,*
vs.
THE UNITED STATES

No. 229.

APPEAL FROM THE COURT OF CLAIMS

APPELLANT'S BRIEF

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STATEMENT OF THE CASE

State of the Record: The claim forming the basis of this appeal was first presented to the Secretary of War on June 27, 1919, under the Act entitled, "An act to provide relief in cases of contracts connected with the prosecution of the war, and for other purposes," approved March 2, 1919, 40 Stat. 1273. The claim was denied by that official October 12, 1920. A petition embodying the claim was filed in the Court of Claims June 15, 1921. On August 12, 1921, the United States filed a demurrer alleging that the petition did not state a cause of action against the United States. On October 31, 1921, the Court of Claims entered judg-

ment sustaining this demurrer. On November 2o, 1921, the plaintiff applied for an appeal. On December 6, 1921, the appeal was allowed. On December 19, 1921, the transcript in the case was filed in this court.

The Facts: In the year 1916, five associated individuals owned machinery, mill equipment, structural steel, real property, water and rail rights, all in condition for the erection and operation of a steel plate mill. After months of negotiations, the associates sold, in May, 1917, all their rights in these assets to the Allegheny Steel Company of Pittsburgh, Pennsylvania. The agreed value of these properties was $3,705,000. The consideration moving from the Allegheny Steel Company was to be paid as follows: $700,000 in cash and the remainder in 58,000 tons of steel plate to be delivered to the associates' order in equal monthly installments during 1918 upon the payment by the associates of a price $3,205,000 below the minimum market value of such plates.

The associates then formed two corporations in which they were the sole stockholders, officers and directors. These corporations succeeded to the rights of the associates in their contract with the Allegheny Steel Company for the 58,000 tons of steel plate, the expected entire production of the Allegheny Steel Company for 1918. To the appellant corporation was conveyed the right to receive 18,000 tons of the total 58,000 tons.

The contract between the appellant and the Allegheny Steel Company required the posting of letters of credit in favor of the Allegheny Steel Company. The appellant posted $2,370,000 in such letters in due season and form. These letters of credit enabled the Allegheny Steel Company to procure and did procure the raw materials necessary to performance of contract with the appellant. The appellant then – of the entire 18,000 tons of plate due under its

contract to responsible parties who established satisfactory credits.

Subsequently, in October, 1917, the United States, acting thru the Director of Steel Supply of the War Industries Board, notified the Allegheny Steel Company that the United States would require the company's entire capacity for production in 1918 and that if the Allegheny Steel Company made any attempt to fill the appellant's contract its entire plant would be confiscated by the United States, and operated for the public use.

The officers of the appellant submitted to what they recognized as a lawful action, but made every effort to secure even a partial performance of the appellant's contract. However, the agents of the United States refused to permit any deliveries to be made to the appellant but continued to take for public use the rights of the appellant to priority in the production of the Allegheny Steel Company, refusing any compensation to the appellant. This situation continued to and including November 11, 1918, and sometime thereafter.

By reason of the described taking by the United States, the loss of the appellant was $900,000. This was the value of the consideration paid by the assignors of the appellant to the Allegheny Steel Company for the appellant's contract with that company.

The appellant alleges that the government by seizing its rights under its contract, appropriating them for public use and destroying the value of its contract, took its property.

ASSIGNMENT OF ERRORS

The Court erred in holding:

First, that the contract between the plaintiff and the Allegheny Steel Company did not constitute property in

the plaintiff within the meaning of the Fifth Amendment to the Constitution.

Second, that when the United States took certain products of the Allegheny Steel Company and prevented that company's fulfilling its contract with the plaintiff that the United States gave the plaintiff no claim against the United States for compensation.

Third, that there was no implied contract between the plaintiff and the United States.

Fourth, that the demurrer should be sustained.

THE ARGUMENT

The finding of the Court of Claims that the plaintiff's (hereinafter called appellant) rights under its contract with the Allegheny Steel Company did not constitute property within the meaning of the Fifth Amendment to the Constitution is not supported by any authority nor by logical reasoning.

Were it not for the statements of the court below and the serious consequences attendant thereupon, the appellant would not take the time of this court to establish the elemental principle of law that rights under a lawful and binding contract constitute property in the holder and that such rights are property within the Fifth Amendment.

The Court of Claims itself in Peabody v. United States, 43 Ct. C. 5 *60* 10, has said: "Property has been well defined to be a person's right to possess, use, enjoy and dispose of a thing not inconsistent with the law of the land;" (citing 1 Lewis Eminent Domain, Sec. 54-58). No doubt this conception of Mr. Lewis finds an early source in 1 Blackstone's Commentaries, 138, where it is said that, "The right to property consists in the free use, enjoyment and disposal of all a person's acquisitions, without any control or diminution, save only by the laws of the land." Blackstone's defi-

nition of property has been cited with approval by innumerable courts and text writers. There can be no doubt that it states the essential features of the concept of property in the law generally.

It remains only to be seen whether when the Fifth Amendment has been discussed there has been any qualification of the meaning of the word "property" which would rob it of application to intangible as well as tangible rights. The state courts have repeatedly met with the necessity of defining the word property both as used in the state constitutions and in the Fourteenth Amendment. We quote from one which is typical of a host. Says the Court in Board of Education v. Bledgett, 155 Ill. 441, "The phrase 'life, liberty or property', in the first section of the 14th Amendment to the Constitution protects every valuable right which a man has, and the term 'property' therein embraces all valuable interests which a man may possess outside of himself, that is to say, outside of his life and liberty." Could the meaning of the word property be less restricted? See also New Hampshire's famous case of Eaton v. B. & M. Ry. Co., 51 N. H., 504; Gulf Railway Co. v. Fuller, 63 Texas, 467; Shaw, C. J., in Old Colony & Fall River R. R. v. County of Plymouth, 14 Gray (80 Mass.) 155 at 161.

Turning again to a text writer, we find in 1 Nichols (second edition) Eminent Domain at p. 336, "The word 'property' as used in the constitutional provision that property shall not be taken for the public use without just compensation, is treated as a word of most general import and is liberally construed. It is held to include every kind of right or interest, capable of being enjoyed as property and recognized as such, upon which it is practicable to place a money value. It embraces both real estate and personal property, tangible and intangible, incorporeal hereditaments and franchises."

In Section 20, Mr. Nichols adds: "Intangible property such as choses in action, patent rights, franchises, charters, or any other form of contract are within the sweep of this sovereign authority [the power of eminent domain] as fully as land or other tangible property." This statement is followed by seven or more citations to the decisions of this court.

Should support be needed for Nichols' statement, we refer to the opinion of Mr. Justice Lurton in Cincinnati v. Louisville & Nashville Ry. Co., 223 U. S. 390 *at* 400; 56 Law Ed. 481 *at* 483 from which the last passage in Nichols is almost a quotation. This court is too familiar with its own opinions in West River Bridge Co. v. Dix 6 Howard 507, 12 Law Ed. 535; James v. Campbell et al, 104 U. S. 356 at 539; 26 Law Ed. 786, at 787; New Orleans Gaslight Co. v. Louisiana Light and H. P. & Mfg. Co., 115 U. S. 650, 29 Law Ed. 516; cited so many times in its decisions, to require more detailed reference to these opinions.

We do wish to quote, however, from Mr. Justice Brewer in Long Island Water Supply Co. v. City of Brooklyn, 166 U. S. 685 at 691, 41 Law Ed. 1165 at 1167. There the question was whether an appropriation by the city of the water company's plant called for compensation to be made the company for the destruction of its contracted opportunities to supply water to a customer. "A contract," says the Justice, "is property, and like any other property, may be taken under condemnation proceedings for public use."

Whether what is defined by the findings of the Court of Claims as "a contract for the future delivery of materials to which the United States is not a party," constitutes property, we contend:

When this court, itself, the courts of last resort in many of the states and recognized text authorities, have repeatedly held and said that property may consist of rights in intan-

gible things as well as rights pertaining to tangible things and that the word "property" as used in both the Fifth and the Fourteenth Amendments includes intangible rights, we submit that rights created by a lawful and binding contract are property. As a consequence, when the appellant set out in its original petition the contract between itself and the Allegheny Steel Company (Transcript of Record p. 15) and that contract on its face was lawful and binding, the appellant certainly claimed, the opinion of the honorable Court of Claims notwithstanding, "property as is contemplated in Article Five [the Fifth Amendment] of the Constitution." (Transcript of Record last line of paragraph beginning on page 22.)

In conclusion on this question, we call the attention of the court to the allegations in the appellant's petition (first paragraph beginning on page 2 of Transcript of Record) which state that for the property rights which the appellant secured, under its contract with the Allegheny Steel Company, the appellant's stockholders transferred to the Allegheny Steel Company a potential steel plant, equipment and accompanying rights valued at upwards of $3,700,000 and that in return the appellant was entitled jointly to receive substantially the entire product of the Allegheny Steel Company for the year 1918 at a price of $3,200,000 below the market value. It must be apparent from this that when the petition alleges the appellant was possessed of property in its contract with the Allegheny Steel Company that it is not alleging bare legal rights without value, but rights bought and paid for with a material consideration of a substantial amount. Indisputably, such rights were property and very valuable property within the meaning of the Fifth Amendment.

Second Assignment of Error

We come now to the second assignment of error, i. e., the holding of the court below that when the United States took certain products of the Allegheny Steel Company and prevented that company's fulfilling its contract with the plaintiff that the United States gave the appellant no claim against the United States for compensation. (Transcript of Record, second sentence beginning on p. 22.)

The appellant was possessed of certain rights in its contract with the Allegheny Company. That contract is set out as Exhibit VI of the appellant's original petition (Transcript of Record p. 15). By reason of this contract the appellant acquired in addition to those rights, common to all purchasers under a contract: the right to receive the finished product; the right to specify, within the capacity of the seller's mills, the gauge and size of the steel plate rolled; the right to inspect under Lloyd's Registered Rules for the Inspection of Steel Vessels, the product as it should be manufactured; the right to pay for the plate delivered at the times and in the manner provided; the right to specify the place of delivery; and finally and most important, the right to have the plates delivered during the year 1918 in approximately equal monthly quantities. It has been explained, in the Statement of Facts (See also Transcript of Record, second paragraph beginning on page 24, that to the appellant was assigned 18.58 of the expected entire production of the Allegheny Steel Company for the year 1918. That the right to get the delivery in equal monthly quantities during the year 1918 was a very valuable one is indicated by the sale of the expected steel plate by the appellant as set out in Exhibit VII of the original petition (Transcript of Record p. 18.)

Against these rights of the appellant what were the acts

of the officers of the United States? Cognizant of these rights, they forbade the Allegheny Steel Company to fulfill its obligations to the appellant under the latter's rights; they commanded the Allegheny Steel Company to fill only such orders as might be given to it by them. They commanded the Allegheny Steel Company to hold its entire manufacturing capacity at the complete and absolute disposal of the defendants; they continued to refuse to permit the Allegheny Steel Company to satisfy the rights of the appellant. (Transcript of Record pp. 4-5.)

What were the practical consequences of the course of the officers of the United States? It should be apparent that by reason of its contracts with the assignors of the appellants the Allegheny Steel Company was richer in equipment capacity and credit to the extent of $3,200,000. (Transcript of Record pp. 2, 7-15.) By reason of the preliminary performance by the appellant of its contract with the Allegheny Steel Company (Transcript of Record next to last paragraph p. 3) the Allegheny Steel Company had purchased sufficient raw materials to manufacture the steel plate for the appellant. The court is as capable as the appellant of visioning the material benefit these performances by the appellant and its assignors brought to the United States when the officers requisitioned the producing capacity of the Allegheny Steel Company's plant.

These benefits which the appellant had purchased and the returns from which it was due to receive from the Allegheny Steel Company were as verily taken by the United States as though the officers of the United States had caused to be substituted in the appellant's contract with the Allegheny Steel Company the name of the United States wherever there appeared the name of the appellant.

Not only, however, did the officers of the United States take the benefits for which the appellant had paid, but they

destroyed whatever benefit there was in the rights which the appellant had in its contract, saving only the right to be fairly compensated for its loss. From the appellant was taken the use, possession and disposal of the steel plates it had a right to receive from the Allegheny Steel Company and which it had already sold. With that went the entire material benefit of all the appellant's rights under its contract with the Allegheny Steel Company. What had been valuable, worth nearly a million dollars, was gone: taken for the public use: lawfully taken, yes, but lawfully compensated for, no.

For generations in this court and in many others, controversies have been waged as to what constitutes a "taking" of private property by the sovereign power. That this appellant had property within the meaning of the Fifth Amendment we think we have established in our argument on the first assignment of error. Let us turn now to what has been decided on what constitutes a taking within the meaning of that amendment.

In practically every case where the taking of intangible rights has been alleged, the plea has been made by the sovereign power that it actually took nothing from the owner; often that it received no benefit from the owner's loss. A good deal of loose thinking has been cloaked under the charge that the injuries were "consequential." These arguments, or their equivalent, were raised in the two leading cases of Pumpelly v. Green Bay and Mississippi Canal Co., 13 Wall. 166, 20 Law Ed. 557, and United States v. Lynah, 188 U. S., 445, 47 Law Ed. 539. Yet the decisions in these cases stand for the proposition that where real property, while not actually reduced to possession by the Government, has necessarily had its actual usefulness effectually destroyed by reason of the exercise of the power of eminent domain, a taking has resulted and compensation

is due. These conclusions are built upon the principle that where the sovereign power considers the general result to be accomplished is for the public good, the interest of the individual which must be sacrificed for the community purpose is to be measured not by the direct value to the public but by the value to the individual of the right taken. This, it is submitted, is the universal doctrine.

Approaching more closely the principle in the case now before the court, we find this court in Monongahela Navigation Company v. United States, 148 U. S., 312, 37 Law Ed. 463, announcing the proposition that: where an exercise of the sovereign power of appropriation at the same time necessarily destroys the value to the owner of an intangible contract right which depends for its value upon the free use, possession and disposition of the tangible property upon which it is founded, there also we have a taking of property for which compensation must be made.

In this case the Monongahela Company owned a charter granted by the state of Pennsylvania, empowering it to collect tolls, and in carrying into effect the powers granted it by its charter, the company had built a lock and dam. Congress thereafter passed an act for the condemnation of this property but made no provision in said act for the payment of compensation, for the charter, or the franchise privileges thereunder. Mr. Justice Brewer in delivering the opinion (p. 337 U. S. Reports; p. 472 Law Ed.) says:

> "And here it may be noticed that, after taking this property, the government will have the right to exact the same tolls the Navigation Company has been receiving. It would seem strange that, if by asserting its right to take the property, the government could strip it largely of its value, destroying all that value which comes from the receipt of tolls, and having taken the property at this reduced valuation, immediately possess

and enjoy all the profits from the collection of the same tolls."

Again the court says at page 343:

> "It is also suggested that the government does not take this franchise; that it does not need any authority from the state for the exaction of tolls, if it desires to exact them; that it only appropriates the tangible property, and then either makes the use of it free to all, or exacts such tolls as it sees fit, or transfers the property to a new corporation of its own creation, with such a franchise to take tolls as it chooses to give. But this franchise goes with the property; and the Navigation Company which owned it, is deprived of it. The government takes it away from the company, whatever use it may make of it; and the question of just compensation is not determined by the value to the Government which takes, but the value to the individual from whom the property is taken."

In Long Island Water Supply Company v. Brooklyn, 166 U. S. 685, 41 Law Ed. 1165, a water company was possessed of its physical equipment, of franchises to operate, and of a contract with the city to supply the city with water. The water company protested condemnation proceedings on the ground that the taking of its plant and franchises constituted an interference with its contract to sell the city water and that such interference was violative of the constitutional prohibition of the impairment by a state of the obligation of contracts. Brewer, J., points out, however, that not only are the physical properties and the franchise property, but the *contract* is likewise property, even tho by such appropriation the State (in this instance the city) by its action with regard to the contract actually does nothing but destroy the value of the contract to the owner. This case on this point is cited with approval no less than five

mises in subsequent decisions by the court which rendered it.

In further support of our contention that the principle of law in the United States is that destruction of rights for public use constitutes a taking, we cite an international view of our law in a case in which a present member of this bench, acting as counsel for the United States, recently most ably contended to the contrary. Certain citizens of Norway were possessed of contracts for the building of fifteen ships in ship yards located in the United States. The United States Shipping Board in 1917 requisitioned the ship yards, the ships under construction and the rights of the Norwegians to have those ships constructed upon which work had not yet been started. Subsequently the United States Shipping Board cancelled the contract for three of the ships before their keels were laid. The claims of the Norwegians not having been adjusted to their satisfaction, a Tribunal of Arbitration between the United States and the Kingdom of Norway was arranged for under the terms of the Hague Convention of 1907. This Tribunal met at the Hague and there after exhaustive argument by Counsel for the United States and for Norway presented its opinion on October 13, 1922.

Counsel for the United States contended that the property of the claimants in their contracts "was an entity distinct from the material and other tangible things subjected to the property and that when the owner of the ship building contract continued to have the use and possession as before, the property is not taken in the constitutional meaning, however much it may be depreciated in value. They contended that this was a case of consequential damages which are not awarded in the United States." (Original p. 30 of the "Award of the Tribunal of Arbitration between the United States of America and the Kingdom of Norway under the Special Agreement of June 30, 1921.")

After consideration of many decisions of the Supreme Court of the United States cited by both sides, the Tribunal said (Original page 31 of the "Award of the Tribunal of Arbitration between the United States of America and the Kingdom of Norway under the special agreement of June 30, 1921"):

> "The Tribunal cannot agree with this contention of the United States. * * * The United States intended to 'take' and have 'taken' in fact the contracts under which the fifteen hulls in question were being constructed by American Shipbuilders in 1917. These contracts were the property, or created it, and what the United States call 'physical property' is only one of the elements or aspects of the 'property' under the municipal law of the United States, as well as under the law of Norway and other states.
>
> "It has been proved that the claimants lost the use and possession of their property through an exercise by the United States of their power of eminent domain. * * * As the United States have taken up the position and have acted in such a way that such transfer of the property implied cancellation or 'destruction' of the Jura in personam or in rem, it must be adjudged and awarded, in conformity with the American doctrine and jurisprudence itself, that this action of the United States is equivalent to the taking of private property as defined in the Fifth Amendment of their Constitution."

Here is an international tribunal technically unrestricted by the decisions of this court but finding itself bound to follow the cogency of its reasoning. Incidentally, we call attention to the announcement of the Tribunal that the doctrine for which we contend is valid "under the municipal law of the United States as well as under the law of Norway and other states." This general acceptation must be founded upon fundamental principles of equity, justice and expediency.

We call attention to another development of this destruction doctrine in a line of cases where there is hardly more than a destruction of contract rights, and where, in spite of the fact that the agent of the sovereign power gets none of the benefits held by the contractor, nevertheless compensation must be made for the loss. The first case is of value because we find the court working out the right answer by the sheer logic of its reasoning.

This is the case of Cornwall v. L. & N. Ry., 87 Ky., 72, 7 S. W., 553. The facts in this case were that the appellants dedicated to public use for a railroad right of way certain land, and as consideration for such dedication received a contract from the City of Louisville, by the terms of which the city agreed that no more of the appellants' property should thereafter be taken for public use. Subsequently, the L. & N. Railway began condemnation of more of the appellants' land and the appellants sued to enjoin the proceeding on the strength of their contract with the City of Louisville. The court held that the railroad's power to condemn could not be enjoined, saying in its opinion:

> "Appellants will not, as urged by counsel, have a right of action against the city of Louisville, for the contract has not been violated by it; nor does the appellee claim the right to take from appellants the additional land by reason of any authority conferred or stipulation contained in that contract, but solely under the statutory right, independent of and beyond anything contained in the contract. But as the unqualified exercise of that right necessarily involves a violation of a constitutional right that everyone has, to compensation for property taken for public use, is it not in the power and the duty of a Court of Equity in a case like this, to prescribe such terms as will do justice and assure to the property owner his right to compensation? If no such power resides anywhere, then we have a

> plain violation of an express provision of the constitution, which, though indirect, is just as palpable and injurious as if done directly."

The Court, in view of the fact that the taking of the land would destroy the value of the contract, directs the payment by the railroad for the land originally ceded by the appellants as consideration for the contract. In other words, the court holds that if the value of the appellants' contract is to be taken from them, they must be compensated for that value. This is the ruling we ask for in the case at bar.

In the case of Trustees v. City of Atlanta, 93 Ga. 468, the Atlanta University maintained a bridge over a street. By contract the City recognized this easement and promised to leave it perpetually undisturbed. The state granted the city a right "to open, lay out, widen, straighten and otherwise change streets." Under this the city undertook to have the bridge maintained by the University removed. Over the protest of the University, the court held the compulsory removal was lawful under the State's power of eminent domain provided the compensation paid comprehended not only the value of the property, but also the right to have it there. At p. 576, it is said "Reduced to its essence, a constitutional exercise of the right of eminent domain is not deprivation of property, but a compulsory exchange of one kind of property for another or rather a compulsory sale of property for money, an exchange of equivalent values."

This court is not without a decision similar in its essence to the two proceeding. We refer again to City of Cincinnati v. Louisville and Nashville R. R. Co., 223 U. S. 390; 56 Law Ed. 481. Here upon suit being instituted by the railroad to condemn a right of way over a public landing on the Ohio River, the City of Cincinnati filed a bill to enjoin the railroad from the erection of an elevated way. The

city's contention was based upon its contract with the dedicators of the land to preserve it for public use. Mr. Justice Lurton, delivering the opinion of this court, concedes the obligation of the contract and declares as an unchallenged proposition, that the power of eminent domain resting in the State is unimpaired by the existence of the contract, closing on this point by saying (p. 400 U. S. Reports; p. 483 Law Ed.) "If compensation be made no constitutional right is violated. All of this has been so long settled as to need only the citation of some of the many cases."

While the Georgia case just quoted from may be cited with West River Bridge v. Dix, 6 How. 507; 12 Law Ed. 535; Richmond, etc., R. R. v. Louisa R. R., 13 How. 71, 14 Law Ed. 45; Greenwood v. Union Freight R. R., 105 U. S. 13; 26 Law Ed. 961, and many others, as examples of the requirement that franchises granted may be condemned if compensation is made therefor, the Kentucky case and the decision given by Mr. Justice Lurton are examples of the taking by destruction of simple contracts for which the sovereign power must likewise make compensation.

Let us look now to those cases where there is a lease in real property sought to be requisitioned by the State.

The principle in the lessee cases is this: Where A is the owner and B the lessee, an appropriation by the state of A's property is a taking of B's property and B must be compensated as well as A. Kohl v. U. S., 91 U. S., 367, 23 Law Ed. 449; U. S. v. Inlots, Fed. (Ohio) Case No. 15,441a; In the matter of the City of New York, 120 Appellate Division 700.

The courts of New York have also held that a lessee is entitled to compensation when by the appropriation of the fee hold the lessee's right of renewal is destroyed. Matter of City of New York, 118 Appellate Division 865, affirmed 189 N. Y. 508. It will be noted that here we have

a value in the lessee which is over and above the total value of the property. It is also of interest to observe that the court pays no attention to the city's contention that it does not seek to use the lessee's property.

We suggest an analogy of this type of case to that at bar. In place of A, the fee holder, imagine the Allegheny Steel Company; in place of B, the lessee, put the appellant; in the place of the State demanding real property and the improvements thereon, put the United States demanding manufacturing capacity. Primarily, the fee and the manufacturing capacity are taken from A and the Allegheny Steel Company respectively, but secondarily the contract right of B, the lessee, and the contract right of the appellant, the purchaser, are taken and are destroyed. The state must compensate B; the United States must compensate the appellant.

An even closer analogy is to be found in three famous cases in the Court of Claims. The decisions referred to are those in Meade v. U. S., 2 Ct. Cl., 224; Gray v. U. S., 21 Ct. Cl., 340; Cushing v. U. S., 22 Ct. Cl., 1. In these cases the claimants, citizens of the United States, were the owners of substantiated and valid claims against foreign governments. The rights under these claims, if the court please, were property rights in the owners.

While these private individuals were in possession of the property rights in these claims, the United States Government, without consulting these property owners, surrendered, in treaties negotiated with the foreign powers against which these claims were held, all the rights the claimants had therein. By such action the United States realized certain benefits for the public use, these benefits being entirely divorced from the subject matter of the claim. In other words, to secure the treaty advantages the Government appropriated and destroyed everything of value in the claim-

ants' property. As a consequence, the Court of Claims held that all the claimants who diligently prosecuted their claims and gave proof of their ownership were entitled to compensation.

A further instance of the appropriation of a right of action existing independently of any physical taking is found in Morris Canal and Banking Corporation v. Townsend, 24 Barbour (N. Y.) 658. Here a landowner had a right of action against a canal company by reason of an overflow upon his property caused by the company's dam. The legislature subsequently passed an act authorizing condemnation and appointed commissioners to ascertain the value of land necessary to be condemned. The Commissioners determined the value of the chose in action residing in the landowner by reason of the original trespass committed before condemnation was authorized. The owner of the chose protests. The court decides that the word "property" as used within the Constitution of the State of New York (the clause being the same as that in the Fifth Amendment) includes the right of action accruing to the landowner for the trespasses by overflow occurring prior to the actual condemnation of the land. In other words, the right of action residing in the landowner was subject to the exercise of the power of eminent domain independently of the physical taking of his land provided adequate compensation was made therefor.

The principle in these cases of appropriation of choses in action goes much further than that for which the appellant contends and could be relied upon to support the contention that the United States in destroying the contract rights of the appellant to a portion of the manufacturing capacity of the Allegheny Steel Company for the year 1918, must compensate the appellant even tho the capacity of the Allegheny Steel Company were used for purposes wholly

divorced from those which the appellant's contract covered.

Fortunately, however, the plaintiff does not have to advance such a contention. The facts are that the United States seized the appellant's rights to priority in a definitely assigned portion of the entire manufacturing capacity of the Allegheny Steel Company for the year 1918, and then devoted that capacity to producing the very same plates of steel for which the appellant had contracted and produced this steel from the very raw material which had been purchased by the Allegheny Steel Company for the performance of the appellant's contract, a purchase which had been made possible by reason of the appellant's performance of its initial obligation under the contract. We stand upon the proposition that the United States by reason of prohibiting the performance of the appellant's contract with the Allegheny Steel Company and devoting the manufacturing capacity of the Allegheny Steel Company's plant for 1918 to the purposes of the United States took for the public use the property of the appellant; that the United States received a benefit from this property of the appellant; and that whether or not it received such benefit the destruction of the appellant's rights by the action of the United States constituted a taking within the meaning of the Fifth Amendment and compensation should be made therefor.

Third Assignment of Error

Returning to the third assignment of error, it has always been the understanding of this appellant that it was well established that when the United States lawfully took the property of an individual whose title was not contested that an implied obligation arose upon the part of the United States to pay for the said property. If the property right existed, as we submit it did, and if it was taken for public

use, as we submit, it was, then, on the authority of the following cases, the United States is under an implied contract to pay this appellant reasonable compensation.

United States v. Arthur Lynah, etc., 188 U. S. 445, 47 Law Ed. 539;

United States v. Great Falls Mfg. Co., 112 U. S. 645, 28 L. Ed. 846;

Hollister v. Benedict & B. Mfg. Co., 113 U. S. 60, 28 L. Ed. 901;

U. S. v. Palmer, 128 U. S. 262, 32 L. Ed. 442;

U. S. v. Berdan Fire-arms Mfg. Co., 156 U. S. 552, 39 L. Ed. 530.

Fourth Assignment of Error

If we have established in the mind of the court the rightousness of our other contentions, the fourth assignment of error, i. e. that the court erred in sustaining the demurrer, should be by those contentions, maintained.

CONCLUSION

The appellant's rights in its contract with the Allegheny Steel Company purchased by a material consideration constituted property in the appellant within the meaning of the Fifth Amendment to the Constitution of the United States. The lawful acts of the officers of the United States in prohibiting the Allegheny Steel Company from carrying out its contract with the appellant and in requisitioning the manufacturing capacity of the Allegheny Steel Company constituted by appropriation and destruction a taking of the appellant's property within the meaning of the Fifth Amendment. The appellant is entitled to the compensation which it has not received. The United States is under

an implied contract reasonably to compensate the appellant for the property taken.

Respectfully submitted,

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